(2)

FILED
APR 19 1995
OFFICE OF THE CLERK

No. 94-1578

In The

Supreme Court of the United States

October Term, 1994

ANTHONY T. MANIACE, et al.,

Petitioners,

v.

COMMERCE BANK OF KANSAS CITY, N.A.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES BORTHWICK
SALLY B. SURRIDGE
BLACKWELL SANDERS
MATHENY WEARY &
LOMBARDI, L.C.
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6800

Counsel for Respondent
Commerce Bank, N.A.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a directed trustee of an Employee Stock Ownership Plan governed by ERISA, which may act as to company stock only in accordance with instructions from a named fiduciary, has fiduciary duties within the meaning of ERISA with respect to such stock?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Background 1

B. Proceedings Below 5

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENYING THE WRIT 10

I. Certiorari Should Be Denied Because the Eighth Circuit's Decision In *Maniace* Is Totally Consistent With the Express Mandates of ERISA and with Judicial Precedents on the Issue of Directed Trustees. 10

II. The *Maniace* Decision Is Consistent With Public Policy and Does Not Immunize Directed Trustees From Liability. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 16

Ershick v. United Missouri Bank, 948 F.2d 660 (10th Cir. 1991) 17, 20, 21

FirsTier Bank, N.A. v. Zeller, 16 F.3d 907 (8th Cir.), *cert. denied sub nom. Vercoe v. FirsTier Bank, N.A.*, ___ U.S. ___, 115 S. Ct. 194 (1994) 17

Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) 22

Kerns v. Benefit Trust Life Ins. Co., 922 F.2d 214 (8th Cir. 1993) 6, 11, 19

Maniace v. Commerce Bank, N.A., 40 F.3d 264 (8th Cir. 1994) ..... *passim*

Mertens v. Hewitt Associates, ___ U.S. ___, 124 L.Ed.2d 161, 113 S. Ct. 2063 (1993) 22

Robbins v. First American Bank, 514 F. Supp. 1183 (N.D. Ill. 1981) 12

STATUTES

29 C.F.R. § 2509.75-8 13

29 U.S.C. § 1002(21)(A) 7, 11, 12, 14, 19

29 U.S.C. § 1103 ..... *passim*

29 U.S.C. § 1110(a) 16

29 U.S.C. § 1132 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Restatement (Second) of Trusts § 185 (1959) 20, 21

Scott and Fratcher, IIA *Scott on Trusts* § 185 (4th ed. 1987) 20

No. 94-1578

In The

Supreme Court of the United States

October Term, 1994

ANTHONY T. MANIACE, et al.,

Petitioners,

v.

COMMERCE BANK OF KANSAS CITY, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Commerce Bank of Kansas City, N.A. ("Commerce Bank"), respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

A. Background

Petitioners are former participants and beneficiaries of the Juvenile Shoe Corporation of America ("Juvenile Shoe") Employee Stock Ownership Plan ("ESOP" or

"Plan") who had earned vested retirement benefits under the Plan. Respondent Commerce Bank was the Trustee of the Plan beginning in 1979 when Juvenile Shoe converted its profit-sharing plan into an ESOP. A-21.

In forming the ESOP, Juvenile Shoe executed the Plan document and the Employee Stock Ownership Plan Trust ("Trust" or "Trust document"). The Plan document instructed that the ESOP was "designed to invest primarily Company Stock and that shall be the investment policy of the Plan." Plan Document at § 2.08. Section 2.01 of the Plan document provided that the "Board [of Directors of Juvenile Shoe] shall appoint an Administrative Committee which shall be a 'named fiduciary' within the meaning of Section 402 of ERISA and shall be the Plan Administrator for purposes of ERISA." Among the duties assigned to the Administrative Committee were the following powers:

(1) General management of the Plan and the sole, final and absolute right to reconcile any inconsistency in the Plan;

(2) Interpret and construe the provisions of the Plan in all particulars;

(3) Take all actions and make all decisions and determinations necessary under the Plan;

(4) Direct the Trustee to invest and reinvest funds of the Trust Fund in Company Stock upon such terms and conditions as directed by the Committee and the Trustee shall act as directed by the Committee; and

(5) Direct the Trustee with respect to the distribution, and disbursement from, the Trust Fund.

Plan Document at §§ 2.03, 2.08. The Administrative Committee was thus "given a broad grant of powers under the Plan and was specifically designated as both the 'named fiduciary' and 'plan administrator' for purposes of [ERISA]." A-21. In particular, Paragraph 4 of the Plan document specified that the Administrative Committee was required to direct the Trustee to invest and reinvest Trust funds in Company stock, and the Trustee was required to act as directed by the Committee.

Commerce Bank was named Trustee of the ESOP on February 26, 1979. The Trust document instructed that "[t]he Trustee shall be charged with no responsibility whatever respecting the making of disbursements from the Trust Fund other than to comply with the directions of the Committee. The Trustee shall not be responsible for the administration of the Plan."

The Trust document contained general language permitting the Trustee to invest in savings accounts, certificates of deposit, Juvenile Shoe stock, real estate, securities of companies other than Juvenile Shoe, bonds or mortgages. The Trust document also included general language permitting the Trustee to vote securities held by it.

Those general provisions were applicable only to management of the portion of the ESOP which was not invested in Juvenile Shoe stock. Central to the issues presented in the petition for writ of certiorari, Paragraph 5 of the Trust document limited the general grant of authority to the Trustee with respect to Juvenile Shoe stock:

> Anything herein to the contrary notwithstanding, the Trustee shall as directed by the Committee, from time to time, and upon such terms and conditions as directed by the Committee, purchase, sell, retain, distribute or otherwise act with respect to Company Stock. . . . The Trustee's duties and responsibilities with respect to the purchase, sale, retention, distribution or other action with respect to Company Stock . . . shall be limited to effecting the direction of the Committee, discretionary, fiduciary responsibility with respect to such matters being hereby allocated to the Committee.

A-6 - A-7.

As Trustee, Commerce Bank performed the functions delegated to it by the Plan, subject to the requirements of the Trust. In particular, Commerce Bank held Juvenile Shoe shares for safe-keeping, maintained records on the number of shares held by each Plan participant, and prepared accounting records for use by Juvenile Shoe.

Throughout the 1980s, Juvenile Shoe faced increased competition from lower priced import shoes. For a decade prior to 1988, the number of shoes sold by Juvenile Shoe had declined steadily. Although profits and net worth had remained steady, they too began to decline in the mid-1980s.

As part of its responsibilities as Trustee, Commerce Bank reviewed Juvenile Shoe's financial statements annually. A-22. When the Bank received Juvenile Shoe's 1987 financial statements, it noted that the Company had lost $3 million the prior year. *Id.* Even after meeting with representatives from Juvenile Shoe, Commerce Bank was

concerned about the Company's financial health, including concerns that Juvenile Shoe's complexion had changed from a manufacturing business with a relatively dominant position in medical and children's shoes to an importer in the retail shoe business. A-23.

Commerce Bank submitted its resignation as Trustee in accordance with Paragraph 9 of the Trust document on July 12, 1988, to be effective 60 days thereafter. *Id.* No successor trustee was ever appointed.

In March 1989, Juvenile Shoe filed for Chapter 11 bankruptcy protection. After Juvenile Shoe's primary lender refused to extend additional credit after August 1989, Juvenile Shoe filed for Chapter 7 bankruptcy. After the Company failed in 1989, the Juvenile Shoe stock and the entire balance of the Petitioners' retirement benefits became worthless.

B. Proceedings Below

In July 1990, petitioners filed a Complaint pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, against the Administrative Committee and Commerce Bank, alleging breaches of fiduciary duties under ERISA. Petitioners dismissed their cause of action against the members of the Administrative Committee without prejudice.

After extensive discovery, Commerce Bank filed a motion for summary judgment on all counts. The District Court granted the motion, rejecting, among other contentions, petitioners' allegation that Commerce Bank had fiduciary duties within the meaning of ERISA with

respect to the Juvenile Shoe stock.[1] A-5. The District Court also denied Petitioners' subsequent motion to alter or amend the judgment. A-11 – A-12.

On appeal, the Eighth Circuit properly concluded that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock because it was a directed trustee for the ESOP, and its discretion was explicitly limited vis-a-vis the Juvenile Shoe stock by Paragraph 5 of the Trust document. A-25. *See also* Plan Document at §§ 2.03, 2.08 (Administrative Committee was required to direct the Trustee to invest in Company stock, and the Trustee was required to follow the Committee's directions). In so holding, the Eighth Circuit correctly observed that " 'fiduciary status under § 1002(21)(A) is not an "all or nothing concept . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question." ' " *Maniace v. Commerce Bank, N.A.*, 40 F.3d 264 (8th Cir. 1994) (A-25), *quoting Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214 (8th Cir. 1993) (quotations omitted).

Based on the well-developed factual record, the Eighth Circuit found that Commerce Bank lacked discretion with respect to the Juvenile Shoe stock by virtue of

---

[1] In the District Court and in the Eighth Circuit, Commerce Bank acknowledged that it had ERISA fiduciary duties with respect to the Trust assets (primarily cash) other than the Juvenile Shoe stock. Petitioners did not allege that Commerce Bank had breached any fiduciary duties with respect to the non-stock assets, except insofar as those assets were used to acquire Juvenile Shoe stock. Therefore, the petition for writ of certiorari does not address Commerce Bank's ERISA fiduciary duties with respect to Trust assets other than the Juvenile Shoe stock.

Paragraph 5 of the Trust document and only acted at the direction of the Administrative Committee. A-25. "As such, Commerce could not be a fiduciary (nor breach fiduciary duties) with respect to the JSC stock." A-25.

The Eighth Circuit also concluded in *Maniace* that petitioners had failed (1) to establish that Commerce Bank's handling of the ESOP was contrary to Plan directives or ERISA, or (2) to present evidence that the Administrative Committee had breached a fiduciary duty, much less that Commerce Bank had participated in or knew of such breaches. A-26 – A-28. For these reasons, as well, the Eighth Circuit affirmed the District Court's Order granting summary judgment for Commerce Bank.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because (1) Commerce Bank did not have fiduciary duties with respect to the Juvenile Shoe stock, and (2) Commerce Bank complied with its responsibilities under the Plan and Trust documents and acted in accordance with ERISA.

First, Commerce Bank can be determined to have "fiduciary" duties within the meaning of ERISA only by applying the factors set forth in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). After extensive discovery in the District Court and the entry of summary judgment for Commerce Bank, the Eighth Circuit concluded that Commerce Bank did not have the discretionary authority or control with respect to the Juvenile Shoe stock necessary to satisfy the elements of 29 U.S.C. § 1002(21)(A). The

evidence developed in this case thus supports the Eighth Circuit's proper conclusion that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock.

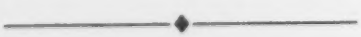
Petitioners have also contended in their second Question Presented as discussed in arguments (5) and (6) of their petition that a decision that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock would thwart public policy by absolving the Bank of all responsibilities under the Plan, particularly with respect to the investment of Plan assets. Contrary to petitioners' position, the provisions of ERISA as well as public policies which underly the statute do not require that a directed trustee have fiduciary duties. Instead, the statute simply requires that *some* fiduciary be responsible for plan assets.

In this case, Commerce Bank had fiduciary duties with respect to certain Plan assets, but the Administrative Committee possessed the fiduciary responsibilities for the Juvenile Shoe stock. That allocation of duties under the Plan and Trust documents was consistent with ERISA and the public policies underlying the legislation.

Moreover, the District Court's holding that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock and the Eighth Circuit's affirmation of that holding did not leave Commerce Bank free of *all* responsibilities as petitioners imply in their second Question Presented. As the Eighth Circuit recognized, Commerce Bank was subject to – and complied with – the statutory mandates in ERISA as set forth in 29 U.S.C. § 1103.

Public policy would actually be harmed by the standard urged by petitioners which would impose conflicting duties on directed trustees. In particular, a directed trustee who investigated independently each direction from the fiduciary charged with certain action could be found on the one hand to have breached a fiduciary duty by failing to follow the terms of the plan. That same trustee could then be found liable on the other hand for breaching a fiduciary duty by following the express terms of the plan and thereby failing to conduct the independent investigation petitioners advocate in this case. Public policy does not support placing directed trustees in such an untenable position, and instead supports the holding below that a directed trustee who complies with the terms of the plan and acts in accordance with ERISA as required by 29 U.S.C. § 1103 is not liable to Plan participants and beneficiaries.

In summary, both the District Court and the Eighth Circuit were presented with a well-developed factual record which supported the conclusion that Commerce Bank had satisfied its obligations under the Trust and the mandates of ERISA. Petitioners' professed fears that directed trustees who do not have fiduciary duties within the meaning of ERISA are immunized from all liability are misplaced, and certiorari should not be granted.



REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because the Eighth Circuit's Decision In *Maniace* Is Totally Consistent With the Express Mandates of ERISA and with Judicial Precedents on the Issue of Directed Trustees.

Petitioners' petition for writ of certiorari carries the theme that if Commerce Bank does not have "fiduciary" duties with respect to the Juvenile Shoe stock, then it has *no* duties or obligations under ERISA. To the contrary, Commerce Bank clearly owed duties to the Plan participants and beneficiaries. In particular, Commerce Bank was at all times required to comply with the Plan and Trust documents and to act in accordance with ERISA. *See* 29 U.S.C. § 1103(a)(1). Based on the extensive factual record presented, both the District Court and the Eighth Circuit concluded that Commerce Bank satisfied its duties under the terms of the Plan and the Trust and acted in accordance with ERISA.

Petitioners focus the substantial part of their attention in the petition for writ of certiorari on the first part of the Eighth Circuit's decision which addressed whether Commerce Bank owed fiduciary duties with respect to the Juvenile Shoe stock. In so doing, petitioners downplay the Eighth Circuit's significant conclusion that petitioners "failed to establish that Commerce's handling of the ESOP was contrary to Plan directives or contrary to ERISA." A-26.

That holding and the Eighth Circuit's supporting analysis reveal the flaw in petitioners' second Question Presented which is premised on the notion that *all* of

Commerce Bank's duties were allocated to the Administrative Committee, thereby absolving the Bank of *all* responsibilities with respect to the investment of Plan assets. As the District Court and the Eighth Circuit properly found, Commerce Bank owed certain duties to the Plan and its beneficiaries and participants, and the Bank fulfilled those duties in compliance with the terms of the Plan and Trust documents and the provisions of ERISA.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), lies at the heart of the petition for writ of certiorari. That provision instructs that "a person or entity is an ERISA fiduciary only to the extent that he (i) exercises discretionary authority or discretionary control with respect to the management of the plan or exercises authority or control with respect to the management or disposition of plan assets, (ii) renders investment advice for a fee or other compensation, or (iii) has discretionary authority or discretionary responsibility in the administration of the plan. The Eighth Circuit has recognized that "fiduciary status under § 1002(21)(A) is not an 'all or nothing concept. . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.' " *Kerns v. Benefit Trust Life Ins. Co.*, 922 F.2d at 217 (quotation omitted), *cited in Maniace*, A-25.

Application of the factors in ERISA § 3(21)(A) presents factual issues to be resolved on a case-by-case basis. The Eighth Circuit's decision that Commerce Bank did not owe fiduciary duties with respect to the Juvenile Shoe stock was based on the extensive record developed in

discovery and presented with Commerce Bank's summary judgment motion. Certiorari is neither necessary nor warranted in order to analyze the factual record and reexamine Commerce Bank's liability.

The evidence presented below demonstrated that Commerce Bank did not have discretionary authority, control or responsibility with respect to the Juvenile Shoe stock. Instead, both the Plan document and Paragraph 5 of the Trust document explicitly limited Commerce Bank's discretion with respect to the Juvenile Shoe stock, and both the District Court and the Eighth Circuit found that the Bank had acted only at the direction of the Administrative Committee. A-10 – A-11, A-26. Based on the factual record, the Eighth Circuit properly concluded that Commerce Bank did not owe fiduciary duties with respect to the Juvenile Shoe stock. A-25.

The United States District Court for the Northern District of Illinois has undertaken a similar analysis with respect to a bank acting as a directed trustee. *See Robbins v. First American Bank*, 514 F. Supp. 1183 (N.D. Ill. 1981). In *Robbins*, plaintiff trustees of a union pension fund asserted a cause of action against the bank which had administered a loan, alleging that the defendant bank had breached its statutory duty as a fiduciary within the meaning of ERISA. *Id.* at 1189. The District Court applied the factors set forth in 29 U.S.C. § 1002(21)(A), concluding that the bank was not a fiduciary with respect to the loan in question. *Id.* at 1190. The District Court found the following facts relevant to its conclusion:

> In the instant case, the bank was merely a servicing agent for a particular investment. The

> bank was never itself involved with the administration or management of the fund itself or in making its investment policies and decisions. The bank was required to fulfill various ministerial functions respecting one investment, including making advances to the borrower and remitting loan repayments to plaintiffs.
>
> * * *
>
> At most, plaintiffs can show that the participation agreement itself gave the bank decision-making authority binding plaintiffs when the parties failed to agree within a reasonable time upon action to be taken concerning an issue which materially affected their interests. . . . Nonetheless, this authority is insufficient to constitute "authority or control respecting management or disposition of [the plan's] assets" within the meaning of [ERISA].

Id. at 1190-91.

Department of Labor regulations further support the fact that a bank performing ministerial functions for an employee benefit plan is not an ERISA fiduciary.

> [A] person who performs purely ministerial functions . . . for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such a person does not have discretionary authority or discretionary control respecting management of the plan. . . .

29 C.F.R. § 2509.75-8. Functions considered by the Department of Labor to be "ministerial" rather than of a "fiduciary" nature include (a) applying rules to determine

eligibility for benefits, (b) maintaining participant records, (c) preparing reports required by government agencies, (d) advising participants of their rights and options under the plan, (e) preparing reports concerning participants' benefits, and (f) making recommendations to others for decisions with respect to plan administration. *Id.* at D-2.

As set forth in the Statement of Facts, Commerce Bank's responsibilities with respect to the Juvenile Shoe stock were limited exclusively to ministerial tasks. For example, each year Commerce Bank prepared a Certificate for each ESOP participant. The Certificate reflected the number of Juvenile Shoe shares held for the benefit of the participant, the value of those shares as determined by an independent appraisal firm not associated with Commerce Bank, and any cash balance in the account. Both the District Court and the Court of Appeals below applied the factors set forth in 29 U.S.C. § 1002(21)(A) to the evidence developed in determining that Commerce Bank's responsibilities for the Juvenile Shoe stock did not rise to the level of "fiduciary" duties.

In seeking a writ of certiorari, petitioners nevertheless complain that the Eighth Circuit erred in concluding that Commerce Bank did not owe fiduciary duties with respect to the Company stock because that holding:

(1) violates the express mandates of ERISA;

(2) is contrary to prior Eighth Circuit precedent on the issue of directed trustees and fiduciary status; and

(3) is inconsistent with the rulings of the United States Supreme Court on the importance of considering common law trust principles and with those well-established common law principles of trust law which apply under ERISA.

Petitioners' contentions lack merit, and their petition for writ of certiorari should be denied.

First, the Eighth Circuit's decision in this case does not violate the express mandates of ERISA. As stated above, ERISA § 3(21)(A) defines fiduciary activities for entities such as Commerce Bank. The evidence presented to the District Court demonstrated that Commerce Bank neither had the discretion nor performed the type of functions which would render it an ERISA fiduciary with respect to the Juvenile Shoe stock.

Petitioners attempt to bolster their argument on page six of their petition by contending that ERISA § 403(a) supports the notion that a trustee is, by definition, an ERISA fiduciary. To the contrary, ERISA § 403(a)(1) addresses the duties of a trustee of an ERISA plan and does not define a trustee as an ERISA fiduciary. 29 U.S.C. § 1103(a)(1). That provision required Commerce Bank to follow any directions received from the Administrative Committee so long as the directions were "proper," "made in accordance with the plan," and "not contrary to [ERISA]."

In support of their argument, petitioners also rely on a 1985 United States Supreme Court decision for the principle that "trust documents cannot excuse trustees from their duties under ERISA, and . . . trust documents must generally be construed in light of ERISA's policies."

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568 (1985), *cited in* Petition at 8. The Supreme Court decision in *Central States* does not support the proposition that a trustee is, by definition, an ERISA fiduciary. Instead, the Supreme Court concluded in *Central States* that the trustees' interpretation of the trust document was reasonable and consistent with ERISA. 472 U.S. at 569.

On page 9 of their petition, petitioners also argue that ERISA § 410(a), 29 U.S.C. § 1110(a), prohibits the allocation of duties required by the Juvenile Shoe ESOP documents. Petitioners misinterpret ERISA § 410(a), which has as its main purpose the principle that a fiduciary cannot be indemnified by the plan for breach of duty or exculpated from liability therefor. By contrast, ERISA § 403(a)(1) is relevant to the issues presented in this case and permits a plan document to allocate responsibility among different persons or entities.

In concluding point (1) in their petition for writ of certiorari, petitioners complain that the Eighth Circuit's opinion in this case, which holds that the language of the Trust document operated to relieve Commerce Bank of its fiduciary duties, is contrary to ERISA statutes and public policy. As discussed above, petitioners fail to recognize that ERISA permits the allocation of duties among those bearing responsibilities under an ERISA plan. *See* 29 U.S.C. § 1103. In this case, both the Plan document and the Trust document designated the Administrative Committee as the entity with responsibility for the Juvenile Shoe stock. *See* Plan Document; Trust Document, Paragraph 5. Under those provisions, Commerce Bank was required to hold the Company stock and to invest in Company stock when directed. ERISA § 404(a)(1)(D), 29

U.S.C. § 1104(a)(1)(D) instructs that Commerce Bank *must* follow provisions of the Plan which are consistent with ERISA. The Juvenile Shoe Plan allocated fiduciary duties among the various fiduciaries of the Plan. All discretionary authority and responsibility with respect to Juvenile Shoe stock was allocated to the Administrative Committee. Commerce Bank's conduct in complying with directions from the Administrative Committee satisfied its obligations under ERISA.

Petitioners have also failed to explain in their quest for certiorari that the Eighth Circuit's decision explicitly recognized the responsibilities and duties owed by directed trustee Commerce Bank pursuant to 29 U.S.C. § 1103. Because the evidence in this case demonstrated that Commerce Bank complied with its duties under § 1103, the Eighth Circuit properly concluded that the Bank satisfied its duties in accordance with the relevant provisions of ERISA.

Second, petitioners contend that the Eighth Circuit's decision in *Maniace* is contrary to Eighth Circuit precedent on the issue of directed trustees and fiduciary status. *See* Petition at 9. Petitioners' argument is based primarily on the 1994 Eighth Circuit decision in *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907 (8th Cir.), *cert. denied sub nom. Vercoe v. FirsTier Bank, N.A.*, ___ U.S. ___, 115 S. Ct. 194 (1994). In its decision below, the Eighth Circuit distinguished *FirsTier Bank* on grounds that the evidence in this case demonstrated that unlike FirsTier Bank, Commerce Bank had no discretion or control with respect to the Juvenile Shoe stock. A-26 – A-27. Therefore, Commerce Bank did not satisfy the fiduciary status test set forth in 29 U.S.C. § 1002(21)(A) as had FirsTier Bank. *Cf. Ershick v. United*

Missouri Bank, 948 F.2d 660, 669 (10th Cir. 1991) (bank was not liable to participants in ESOP because its actions were allowed by the ESOP and undertaken pursuant to the directions of the plan administrator).

Under ERISA and relevant judicial decisions addressing the duties of directed trustees, because Commerce Bank had no duties under the Plan or Trust documents with respect to the Juvenile Shoe stock except to follow the directions of the Administrative Committee, Commerce Bank was required to follow the directions unless it was clear on the face of the instructions that they involved a prohibited transaction or a breach of duty by the directing fiduciary. Similarly, under ERISA Commerce Bank, as a directed trustee, should not have acted in the absence of direction from the Administrative Committee unless it received information that the absence of direction constituted a breach of fiduciary duty by the Committee.

By contrast, the standard urged by petitioners would expose directed trustees to conflicting duties and unwarranted liability. Failure to follow the terms of the Plan and Trust documents constitutes a breach of duty. Therefore, if Commerce Bank had attempted to take some action with the Juvenile Shoe stock without direction from the Administrative Committee or contrary to an Administrative Committee direction, the Bank would have been subject to suit by the Company, the Committee, and participants for breach of duty. On the other hand, petitioners have sued Commerce Bank for following the express terms of the governing documents. Petitioners' efforts are contrary to the language and intent of ERISA and should be rejected.

Moreover, if a trustee must investigate each direction as if it were its own, the protection provided by ERISA § 403(a)(1) would be meaningless. Such a holding would expose directed trustees to unacceptable duties and liabilities, not only with respect to employee stock ownership plans, but with respect to all retirement plans which provide for direction from another named fiduciary.

On page 13 of their petition, petitioners address the factors set forth in 29 U.S.C. § 1002(21)(A) as discussed in *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d at 214. Although petitioners conclude the argument on page 13 of their petition with the bold assertion that the trustee of an ERISA plan is by definition a fiduciary, application of the facts in this case to the factors set forth in 29 U.S.C. § 1002(21)(A) addressed in *Kerns* and cited by petitioner demonstrates that Commerce Bank did not have fiduciary duties with respect to the Juvenile Shoe stock for the reasons discussed more fully above.

Third, petitioners contend without support that "the Eighth Circuit declined to consider or apply the established trust law principles which provide that a directed trustee continues to owe strict fiduciary responsibilities to the beneficiaries of the trust." Petition at 14. As explained above, the definition of a "fiduciary" under ERISA is set forth in 29 U.S.C. § 1002(21)(A). Those factors are no doubt derived, in substantial part, from common law trust principles. The Eighth Circuit applied the factors set forth in the statute in determining that Commerce Bank did not have ERISA fiduciary duties with respect to the Juvenile Shoe stock.

The common law trust principle on which petitioners rely most heavily as support for their argument is § 185 of *Scott on Trusts*, which petitioners cite for the proposition that directed trustees are fiduciaries within the meaning of ERISA. *See* Petition at 15-16, *quoting* Scott and Fratcher, IIA *Scott on Trusts* § 185 (4th ed. 1987). Contrary to the conclusion petitioners draw from § 185, the types of duties discussed by Scott and Fratcher reflect the types of duties and responsibilities placed on trustees by 29 U.S.C. § 1103, and do not lead to the conclusion that directed trustees are defined as ERISA fiduciaries.

First, *Scott on Trusts* § 185 specifically recognizes that trustees should not act in such a way as to defeat or impair substantially the accomplishment of the purposes of the trust. The Juvenile Shoe Plan document identifies as its primary purpose the policy of investing in Company stock. Therefore, Commerce Bank's actions in following directions from the Administrative Committee did not defeat or impair the purpose of the ESOP.

Moreover, the duty of reasonable investigation reference in § 185 of *Scott on Trusts* should not be applied in this case because:

(1) ERISA § 403(a)(1) does not, by its terms, impose a duty to investigate;

(2) such a decision would be consistent with ERISA's legislative history and the Tenth Circuit's conclusion in *Ershick*; and

(3) such a conclusion is consistent with other common law authorities and sound public policy.

ERISA § 403(a)(1), *Ershick*, and sound public policy have been discussed above. Additionally, the rule of law advocated by Commerce Bank and affirmed by the Eighth Circuit is consistent with other common law authorities.

The *Restatement (Second) of Trusts* § 185 (1959) reflects the common law with respect to the duty of a trustee to follow the direction of a person with a power to control – "the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power." This rule of law does not impose a duty to investigate, but merely a duty not to ignore breaches of duty of which the trustee has notice.

The fact that Commerce Bank had such responsibilities does not make the Bank an ERISA fiduciary with respect to the Juvenile Shoe stock. The Eighth Circuit agreed, concluding that Commerce Bank did not have fiduciary duties with respect to the stock, but that the Bank had satisfied the statutory mandates of 29 U.S.C. § 1103 by acting in accordance with the terms of the ESOP and in compliance with ERISA. A-26. No purpose would be served by granting certiorari in this case, particularly where the two Court of Appeals' decisions which have addressed the responsibilities of directed trustees – *Maniace* and *Ershick* – found that the trustees were not liable.

II. The *Maniace* Decision Is Consistent With Public Policy and Does Not Immunize Directed Trustees From Liability.

Finally, in points (5) and (6) of their petition for writ of certiorari, petitioners contend that the *Maniace* decision thwarts important public policies. In particular, petitioners argue that that decision, coupled with the United States Supreme Court decision in *Mertens v. Hewitt Associates*, provides complete immunity for trustees of ERISA plans. *See* Petition at 17; *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L.Ed.2d 161, 113 S. Ct. 2063 (1993).

To the contrary, although the Court of Appeals concluded in *Maniace* that Commerce Bank was not a fiduciary within the meaning of ERISA based on the facts in this case, the Bank nevertheless faced – and satisfied – strict statutory mandates pursuant to ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1). Rather than being "immunized" from liability, Commerce Bank was properly held to the requirements of ERISA § 403(a)(1) that the Bank act at all times in accordance with the terms of the Trust and the Plan *and* in a manner which was not contrary to the requirements of ERISA. *See id.*

Moreover, the United States Supreme Court did not hold in *Mertens v. Hewitt Associates* that nonfiduciaries are not subject to *any* liability under ERISA. Instead, the Supreme Court concluded that nonfiduciaries may not be held liable for *money* damages. 124 L.Ed.2d at 174. Such persons and entities may nevertheless be held liable for equitable relief. *See, e.g., Howe v. Varity Corp.*, 36 F.3d 746, 755 (8th Cir. 1994) (recognizing that *Mertens* does not

preclude an award of traditional equitable relief against nonfiduciaries).

Petitioners' cry that Commerce will be "completely immune from participant suits in state or federal court, regardless of what they have done," thus rings hollow. Commerce Bank was subject to the requirements of 29 U.S.C. § 1103 at all times with respect to the Juvenile Shoe stock, and the Eighth Circuit properly concluded that Commerce Bank had met its obligations with respect to the stock. Certiorari is thus unwarranted in this case based on statutory requirements, judicial decisions, or public policy concerns.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. BORTHWICK
SALLY B. SURRIDGE
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI, L.C.
Two Pershing Square, Suite 1100
2300 Main Street
P.O. Box 419777
Kansas City, Missouri 64141-6777
(816) 274-6800
FAX # (816) 274-6915

Attorneys for Respondent
Commerce Bank of Kansas City, N.A.